Legal Issues - The OMB Circular A-76 Cost Comparison Process

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What is OMB Circular A-76?- Basic Philosophy

- OMB rationale behind issuance of the Circular and Handbook
  - To provide general guidance on the A-76 process, not a roadmap (many details are left up in the air).
  - Personnel managing the process are expected to exercise good business judgment.
- Primary Purpose of the Process- To determine if the function being studied is more appropriate for in-house or contractor performance.

Methodology Used to Reach Decision

- Procurement process with several major differences . Some A-76 unique examples, not present in normal procurement process
  - To displace current provider of service, the “challenger” must win by at least 10%
  - In some circumstances, government given second chance to adjust “performance level”- may be affected by upcoming DOD guidance.
  - Government must obtain 3rd party verification of its cost

Other Non-Procurement Issues Involved in Process:

- Labor Issues; Examples
  - Service Contract Act Issues
  - Right of first refusal
  - Union/Employee Participation in Process
- Civilian Personnel Issues:
  - Reduction in force regulations
- Miscellaneous Problems
  - Small business issues (e.g. “bundling”)
  - POLITICAL CONCERNS

A-76 Process- “Nuts and Bolts”

- Prepare Performance Work Statement
- Determine if any exemptions (NISH, Native Americans etc.) or waiver is applicable.
  - Criteria for waiver
    - Conversion will result in significant financial or service quality improvement and will not serve to reduce competition
    - The waiver will establish why in-house or contract offers have no reasonable expectation of winning
- Direct conversion to Native American Firms

DEC/Battelle

Protest B-281224-281224.6, 1-12-99

- GAO sustained protest when 14 members of a 16 member SSEB held jobs that were to be studied, finding a non-mitigatible conflict of interest. Re-evaluation was required.
- OGE objected stating that 18 USC 208 (b) (2) would allow participation if the only conflict is due to Federal employment.
- GAO response- OGE concerns do not relate to the “integrity of process”, which can be compromised by less than a statutory violation.

Usual A-76 Process (continued)

- Most Efficient Organization (MEO) formulated by Government
- Request for Proposals (RFP) issued.
- Contract Proposals evaluated-challenger selected
- Contract “challenger” compared to government estimate.
- Selected “challenger” need not be lowest cost offeror.

Best Value”(per OMB) in the MEO- “Challenger” Comparison

- SSEB reviews Government Management Plan to determine if it will achieve the same level of performance and quality as “challenger”.
- If not, Plan is adjusted to meet new standards accepted by SSEB. Government revises management plan and cost estimate.
- In either case, final comparison based on lowest cost basis.

Streamlined Process

- Applies to activities with 65 or fewer FTE
- Current government labor and material costs become the MEO
- Total MEO cost compared with not less than 4 “comparable”government contracts.
- If the Government's cost is below or within the range of the “comparable” contracts, function stays in-house
- Major problem- what is a “comparable” contract?

Right of First Refusal- A-76 vs. FAR 52.207-3

- FAR says displaced employees (those identified for RIF) get first choice of openings, if they exist, for which they are qualified, for 90 days.
- A-76 Handbook says first choice for displaced government and contractor employees for openings “created by award”. No stated time limit.
- Follow the FAR procedure.

Administrative Appeal Process- The Board and the Appellees

- Appeals board made up of personnel (one or more) who are independent of the activity under review or at least two organizational levels above the official who certified the Government's MEO and Management Plan.
- Who may appeal:
  - Federal employees or their representative
  - Contractors who submitted formal bids
  - Agencies who have submitted bids to provide services through ISSAs.

Administrative Appeals Process- What May Be Appealed- Cost Comparison Handbook- Page 13

- The agency's compliance with the requirements and procedures under A-76.
- Specific issues regarding costs entered on the applicable cost comparison form.
- Appeal will not be granted unless the items appealed, individually or in aggregate, would reverse the tentative decision.

Administrative Appeals Process- What May Not Be Appealed

- The selection of one contract offeror or another for competition with the in-house estimate
- Award to one contractor in preference to another
- Government management decisions involving the Government's certified in-house MEO

Administrative Appeals- What May Not be Appealed- Part 2

- The polices or procedures contained in the Circular and the supplement to the circular (Cost Comparison Handbook)
- Appeal Authority may not review any item unless it is formally challenged.

Protests to the GAO

- GAO will accept protests once the process has progressed into the procurement phase (once the solicitation has been issued).
- After the solicitation has been issued, normal GAO protest rules will apply.
- GAO will require exhaustion of administrative remedies- issues must have been raised first at the administrative appeals process.

Court Challenges

- General Rules (Differ between Federal Circuits)
  - Disappointed bidders may challenge final decision in court
  - Federal employees may not challenge (except in the 6th Circuit)
  - Successful challenges have usually been based on agency failure to follow procedure.

Miscellaneous A-76 Issues- Service Contract Act

- Service Contract Act (SCA) problems
  - Outdated wage determinations
    - (See General Security Services Inc., B-280959, B-280959.4., 98-2 Comp. Gen. 143, December 11, 1998).
  - Lack of appropriate classifications for government performed positions
  - Updated fringe benefit calculations
  - Treatment of voluntary labor- If authorized, Government may use volunteers. Contractors must pay everyone under SCA.

Miscellaneous A-76 Issues- Consultation with Employees

- May be with union , if one exists
- A-76 Handbook says “keep them informed”.
- 10 USC 2467 requires consultations “at least monthly”
  - A-76 Issues not negotiable under Executive Order 12871 (See 179 F.3d 946)

Miscellaneous A-76 Issues- Small Business

- Bundling
- Set- Asides

Miscellaneous A-76 Issues- FAIR Act

- Requires publication of inventory of non-inherently governmental positions
  - Inventory listing or non-listing may be appealed to the agency (ASA, M&RA) by "interested parties"
- Requires agencies to consider contracting inventory items "within a reasonable time"
- Does not create a schedule for contracting our any functions.

Other Non A-76 Outsourcing Programs

- Utility Privatization (Authorized under 10 US Code 2688)
- Energy Savings Performance Contracts (42 US Code 8287)
- Housing “Privatization” (10 US Code 2801 *et.seq.)*

Conclusion

- The “good government”/ “re-engineering’ portion of A-76 is about to collide with the procurement procedures of the FAR.